

N O. 2 2 7 5 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FISHEL PRODUCTS COMPANY, a
copartnership consisting of EDWARD
R. FISHEL and JOHN D. FISHEL,

Appellants,

vs.

COMMODITY CREDIT CORPORATION,

Appellee.

BRIEF FOR THE APPELLEE

APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN P. HYLAND,
United States Attorney,
JAMES STOTTER II,
Special Assistant to the
United States Attorney,

1143 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
Commodity Credit Corporation

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
COUNTER-STATEMENT OF THE FACTS.	1
I INTRODUCTION.	1
II THE STATUTE INVOLVED.	2
III THE CONTRACTS.	4
IV ADMINISTRATIVE PROCEEDING.	7
V UNITED STATES DISTRICT COURT PROCEEDINGS.	9
THE CONTESTED ISSUES.	11
ARGUMENT.	12
I THE CCC'S CLAIM IS BASED UPON THE PROVISIONS OF THE CONTRACTS.	12
II THE BOARD'S DECISION IS FINAL EVEN THOUGH THE CONTRACTS HAD BEEN TERMINATED.	13
III NO ERROR OF LAW IS REVEALED IN THE RECORD OF THE ADMIN- ISTRATIVE PROCEEDING.	23
CONCLUSION.	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Boomer v. Abbett, 121 Cal. App. 2d 449, 263 P. 2d 476 (1953)	14, 15
Compudyne Corporation v. Maxon Construction Co., 248 F. Supp. 83 (E. D. Pa. 1965)	14, 15
Crown Coat Front Co. v. United States, 386 U. S. 503 (1967)	22
E. I. du Pont de Nemours & Co. v. Lyles & Long Construction Co., 219 F. 2d 328 (4th Cir. 1955)	14, 15, 16
Helvering v. Wood, 309 U. S. 344 (1940)	23
McCullough v. Kammerer Corp., 323 U. S. 327 (1945)	23-24
New York, New Haven & Hartford R. R. Co. v. Reconstruction Finance Corp., 334 U. S. 811 (1948)	24
Palmer v. Reconstruction Finance Corporation, 164 F. 2d 466 (2nd Cir. 1947), cert. denied	24
Silverblatt & Lasher, Inc. v. United States (1944), 101 Sup. Ct. 54	14
Silverman Brothers, Inc. v. United States, 324 F. 2d 287 (2d Cir. 1963)	15, 16
United States v. Carlo Bianchi & Co., Inc., 373 U. S. 709 (1963)	3, 20
United States v. Duggan, 210 F. 2d 926 (8th Cir. 1954)	14, 16
United States v. Anthony Grace & Sons, Inc., 384 U. S. 424 (1966)	20
United States v. Heaton, 195 F. Supp. 742 (D. Neb. 1961)	14
United States v. Joseph A. Holpuch Co., 328 U. S. 234 (1946)	20

United States v. Hamden Co-operative Creamery Co., 297 F. 2d 130 (2nd Cir. 1961)	15
United States v. Utah Construction and Mining Co., 384 U. S. 394 (1966)	12, 18, 21
United States v. Wunderlich, 342 U. S. 98 (1951)	3

Statutes

15 United States Code 714 et seq.	1
41 United States Code 321	2, 3, 10, 12, 13
41 United States Code 322	3, 10, 23

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FISHEL PRODUCTS COMPANY, a
copartnership consisting of EDWARD
R. FISHEL and JOHN D. FISHEL,

Appellant,

vs.

COMMODITY CREDIT CORPORATION,

Appellee.

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE FACTS

I

INTRODUCTION

This is an appeal from the action of the United States District Court for the Eastern District of California granting a motion for summary judgment in favor of the Commodity Credit Corporation ^{1/} (hereinafter referred to as "CCC"). The Court

1/ The Commodity Credit Corporation is a corporation whose stock is wholly owned by the United States of America. See Commodity Credit Corporation Charter Act, 15 U. S. C. 714. et seq.

granted summary judgment in favor of the CCC in the amount of \$159,967.07, plus interest, on the ground that all issues in the case were heard and decided by the Contract Disputes Board (hereinafter referred to as "Board"), which decision was supported by substantial evidence and was not obtained by fraud. By granting the CCC's Motion for Summary Judgment, the District Court ruled against appellants (hereinafter referred to as "Fishel") on their Complaint, and in favor of CCC on its counterclaim.

The CCC deems it necessary to make the following counter-statement of the facts in order to accurately state the relevant facts in the administrative proceeding and in the District Court hearings.

II

THE STATUTE INVOLVED

The applicable statute in this case is the "Wunderlich Act" (41 U. S. C. 321, 322) which provides:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such

official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

(41 U. S. C. 321).

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

(41 U. S. C. 322).

These statutes were enacted by Congress to expand the basis for judicial review of administrative decisions in Government contracts containing "disputes" clauses. See United States v. Bianchi, 373 U. S. 709, 713 (1963). In United States v. Wunderlich, 342 U. S. 98, 100 (1951), the court determined that judicial review was limited to cases founded on fraud, i. e., "conscious wrongdoing, an intention to cheat or be dishonest". The effect of the Wunderlich Act is to authorize judicial review where it can be shown that the administrative decision was fraudulent, capricious, arbitrary, so grossly erroneous as to necessarily imply bad faith, or is not supported by substantial evidence.

III

THE CONTRACTS

This appeal arises out of two contracts for processing by Fishel of wheat, owned by the CCC, into bulgar. Copies of the contracts [GR(M) 5499 and GR(M) 5516] are contained in File Number 1 of the Record of the Administrative proceeding (hereinafter referred to as "Ad. Rec. No. 1") under the section entitled "Petitioner's Appeal". The "Announcement For Processing of Wheat Into Bulgar" dated May 18, 1962 (Ad. Rec. No. 1), and the "Uniform Contractual Provisions" (Ad. Rec. No. 1), incorporated by reference in the contracts, contain the provisions pertinent to this lawsuit. Provision is made for Performance Security (Section XVII of the Announcement) and Specifications for Bulgar (Section VI of the Announcement). In addition, the contracts contained detailed provisions setting forth contractual remedies in favor of the CCC with respect to the following:

- a. Defective Performance (Section VII of the Announcement);
- b. Delay or Failure to Perform (Article 23 of the Uniform Contractual Provision);
- c. Liquidated Damages to CCC (Section XIII of the Announcement);
- d. Liability -- contractor shall be liable for loss, damage, destruction, or deterioration of wheat delivered for processing (Article 22

- of the Uniform Contractual Provisions);
- e. Demurrage Charges (Article 21 of the Uniform Contractual Provisions);
 - f. Determination of Weights and Grades on CCC Wheat -- provides contractor shall pay expense of reweighing when contractor requests it (Section V (a) of the Announcement).
 - g. Inspection and Checkloading -- contractor shall pay the cost thereof (Section XIV of the Announcement).

Article 23 of the Uniform Contractual Provisions, which deals with delay or failure to perform, states:

"If Contractor refuses or fails to perform within the time specified in the contract with respect to any shipment, or any extension of such time, Agency may, by written notice, terminate the right of Contractor to proceed with the servicing of all or any part of the commodity which has not been serviced. In addition to any damages which may be provided for in the contract for refusal or failure to perform within the time specified, Agency shall be entitled to recover the difference between the contract price and the amount which Agency may pay for having any part of the commodity serviced elsewhere, and any additional costs it may incur in connection therewith. . . ."

The disputes clause of this contract, Article 39 of the Uniform Contractual Provisions, states:

"Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, or designee of Agency, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to Contractor. Within 30 days from the date of receipt of such copy, Contractor may appeal by mailing or otherwise furnishing a written appeal addressed to the head of Agency, or such other persons as Agency may designate to receive such appeal and the decision of the head of Agency or his duly authorized representative for the hearings of such appeals shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence:"

This provision is part of the standard disputes clause found in most Government contracts.

IV

ADMINISTRATIVE PROCEEDING

The Administrative Proceeding resulted from an appeal by Fishel on April 10, 1963, of the action of the Contracting Officer terminating Fishel's right to proceed under the contracts. The contracts were terminated on the dual grounds that Fishel (1) failed to deliver bulgar in accordance with the terms of the contracts, and (2) failed to furnish the performance bond required by the contracts (Ad. Rec. No. 1). In the telegram, dated April 4, 1963, terminating Fishel's right to proceed, Fishel was also put on notice that the CCC would hold the company liable for all damages resulting from its failure to perform (Ad. Rec. No. 1, Exhibit 15).

An Administrative Hearing on Fishel's appeal was held before the Board in Fresno, California on November 19th, 20th, 21st and 22nd, 1963. The transcript of this Hearing contains 586 pages of testimony (hereinafter referred to as "Tr. "). The entire record of the Administrative Proceeding, including pleadings and exhibits, is contained in six files (Ad. Rec. No. 1 through No. 6).

On the first day of the hearing, CCC's attorney presented Fishel with the Contracting Officer's findings of fact, and a determination as to the amount of damages claimed by CCC (Tr. pp. 18-19, 401-402; Ad. Rec. No. 4, Exhibit 11). The Board ruled that the Contracting Officer's findings were determinations of fact within the meaning of the disputes clause of the contract. The

Board allowed Fishel additional time within which to present any evidence they might have relating to the Contracting Officer's determination as to the amount of damages (Tr. pp. 397-400). During the Hearing, Fishel's attorney stated Fishel only desired to present contravening evidence by way of affidavit, if such information became available (Tr. pp. 486-487).

At the conclusion of the Hearing, Fishel's attorney pointed out that, if the Board determined the contracts had been properly terminated, the issue of damages would become moot. He suggested the Board decide the issues in two stages: First, whether the contracts had been properly terminated, and, if so, second, the amount of damages resulting from Fishel's failure to perform. The Board adopted this suggestion (Tr. pp. 579-580). After the hearing was closed (Tr. pp. 581-584) counsel for Fishel reaffirmed his agreement with this method of proceeding by letter to the Board dated January 8, 1964 (Ad. Rec. No. 6).

The written decisions of the Board were made in two parts. The Board first determined, on May 8, 1964, that the contracts had been properly terminated, and stated: "Parties have thirty days within which to submit additional evidence with respect to the amount of the damages suffered by CCC including evidence on the point of whether CCC took proper action to mitigate its damages " (Exhibit "K" to CCC's Answer and Counterclaim filed on Oct. 19, 1965 in the District Court).

Thereafter, Fishel filed a supplemental answer to the CCC's administrative claim for damages, alleging CCC failed to

mitigate damages (Ad. Rec. No. 6). However, Fishel did not submit any evidence in support of their allegations, either at that time, or at any other time during the Administrative Proceeding or during the District Court hearings. Thereafter, on November 30, 1964, the Board made its determination concerning damages (Exhibit "L" to CCC's Answer and Counterclaim filed on October 19, 1965 in the District Court). Some items claimed by the CCC were allowed and other items were disallowed. The total damages awarded by the Board to the CCC against Fishel were \$159,967.07.

The Board denied Fishel's claim that the CCC had failed to mitigate its damages basing its denial upon the substantial and undisputed evidence contained in the Administrative Record (Exhibit "L" to CCC's Answer and Counterclaim filed on October 19, 1965 in the District Court).

V

UNITED STATES DISTRICT COURT PROCEEDINGS

Fishel filed their Complaint in the United States District Court for the Eastern District of California (then a part of the Southern District of California) on April 13, 1965, seeking damages for loss of profit resulting from wrongful termination of the contracts, and damages for failure to pay the agreed fee for processing wheat into bulgar. (Originally, the Complaint was against the Agricultural Stabilization and Conversation Service, and the United States of America, as well as the CCC, but on May 22, 1965, the

Court dismissed the action against all defendants but the CCC.)

Fishel's Complaint originally contained no allegations which would form a basis for judicial review under the requirements of the Wunderlich Act (41 U.S.C. 321-322). On April 27, 1967, Fishel filed an Amended Complaint containing the required allegations. CCC filed a Counterclaim in this action on October 19, 1965, seeking damages of \$159,967.07, the amount determined by the Board, plus interest.

CCC filed a Motion for Summary Judgment on September 15, 1966, on the ground that the decision of the Board was final. This Motion was based both on the disputes clause of the contracts and the Wunderlich Act. After briefs were filed and argument heard, the Court, on December 11, 1967, filed its Order stating, in part " . . . All the issues involved in this case were heard and determined by the Contract Disputes Board, whose decision is supported by substantial evidence and was not obtained by fraud. . . ."

Fishel filed a motion for reconsideration which was denied by the Court, and Judgment was entered on January 24, 1968, awarding the CCC the sum of \$159,967.07, plus interest at the rate of 7% per annum from November 30, 1964, together with costs in the amount of \$20.00, against Fishel Products Company, a copartnership, Edward R. Fishel, and John D. Fishel, and each of them.

THE CONTESTED ISSUES

I. Appellants have specified five issues to be resolved in this appeal. However, they present arguments with respect to only their first two issues. For reasons of clarity and accuracy of analysis under the authorities cited, Appellee has reworded the Appellants' two issues and restated them below as three separate issues. Appellee considers the last three issues stated by the Appellants in their Brief (page 6), to have been abandoned through Appellants' failure to present any arguments or authorities in their support. Therefore, no counterarguments or authorities are presented with respect to the three issues.

II. The issues raised by the Appellants in this appeal may be more exactly stated as follows:

- A. Is the CCC's claim based upon the relief provisions of the contracts, or upon the general law of damages resulting from a breach of the contract? (A restatement of part of Appellants' issue 1.)
- B. Is the administrative determination of a dispute, arising out of Government contracts which contain the standard disputes clauses, final and conclusive, even though the contracts were terminated? (A restatement of part of Appellants' issue 1.)

C. Does the record of the Administrative Proceeding in this matter reveal any error of law? (A restatement of Appellants' issue 2.)

ARGUMENT

I

THE CCC'S CLAIM IS BASED UPON THE PROVISIONS OF THE CONTRACTS.

The CCC's claim is for remedies provided in the contracts, and the administrative determination with respect thereto, is final and conclusive. Even if the CCC's claim were based upon the general law of damages resulting from breach of the contracts, the administrative determination of the factual issues decided by the Board cannot be disregarded nor can the factual issues be tried de novo by the District Court.

The distinction between a) issues arising in connection with the enforcement of a right conferred by a Government contracts which contain a "disputes clause", and b) an action for damages resulting from breach of such contract, is discussed at length in United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966). The former is subject to determination under the disputes clause within the limitations prescribed by the Wunderlich Act. The administrative determination based thereon is final and conclusive, subject only to judicial review. No administrative proceeding

is required with respect to the latter (an action for damages based on the principle of the general law of damages). An original action may be filed in Court with respect thereto. If there has been an administrative proceeding under the disputes clause, however, the relevant findings of fact in such proceedings are binding in Court and a trial de novo may not be had (Id. at 420). This result is required by the terms of the contractual agreement of the parties, and the result is in harmony with the principles of collateral estoppel and res adjudicata (Id. at 421-422).

In the case now before this Court, the Board in its November 30, 1964 determination of damages relied strictly upon the terms of the contracts to decide the amount of Fishel's liability (Exhibit "L" to CCC's Answer and Counterclaim filed on October 19, 1965 in the District Court). Some items of damage claimed by the CCC were allowed by the Board, and other items were disallowed. As to the allowance or disallowance of the items of damage, the Board's determination was properly based upon the applicable provisions of the contracts, and not upon the general law of damages.

II

THE BOARD'S DECISION IS FINAL EVEN
THOUGH THE CONTRACTS HAD BEEN
TERMINATED.

The disputes clause of the contracts in question remain operative even though the contracts were terminated. Subject only to the limitations of the Wunderlich Act, the administrative

determination pursuant to the disputes clause is final and conclusive upon the parties and not subject to judicial review.

Appellants argue that an administrative determination under the disputes clause of the contracts is not required where the contracts are terminated for alleged default by the contractor. Appellants misconceive the theory upon which damages were determined by the Board in the administrative proceeding. Use of the word "default" used by the Appellants suggests that they believe the Board relied upon a breach-of-contract theory to determine the amount of damages. As has been mentioned above, the Board relied upon specific provisions of the contracts to determine the damages.

Furthermore, the authorities relied upon by Appellants are factually inappropriate to this case and/or have been superseded by more recent cases. Appellants cite: Compudyne Corporation v. Maxon Construction Co., 248 F. Supp. 83 (E. D. Pa. 1965); E. I. du Pont de Nemours & Co. v. Lyles & Long Construction Co., 219 F.2d 328 (4th Cir. 1955); United States v. Duggan, 210 F.2d 926 (8th Cir. 1954); United States v. Heaton, 195 F. Supp. 742 (D. Neb. 1961); and Boomer v. Abbott, 121 Cal. App.2d 449, 263 P.2d 476 (1953). ^{2/} In all of these cases there had been no administrative determination based on the contract disputes clause prior to the time the court action was filed. In addition, the

^{2/} Appellants also cite and quote from the case of "Silverblatt & Lasher, Inc. v. United States, 1944, 101 Sup.Ct. 54". However, Appellee has been unable to find this case at the citation provided.

Compudyne, E. I. du Pont and Boomer cases involve only private parties and not an agency of Government.

The factual irrelevance of this line of authorities was noted in United States v. Hamden Co-operative Creamery Co., 297 F.2d 130, 133 (2nd Cir. 1961), and Silverman Brothers, Inc. v. United States, 324 F.2d 287, 289 (2nd Cir. 1963). The court, in these cases, held that where there had been an administrative determination based on a disputes clause, the court was bound by the findings of fact in the administrative proceeding, even though the contracts had been terminated.

The Hamden case involved contracts for the sale of a food product (powdered milk) to the CCC. In denying an appeal from the decision of the District Court which granted the CCC's motion for summary judgment based upon the decision of the Contract Disputes Board, the court stated:

"Inasmuch as the appellant has appeared, briefed, and argued its case before the Contract Disputes Board without reservation and in compliance with Article 22, it is now too late for it to assert that the Board could not decide the factual issues presented in appellant's dispute with the Government. This disputes clause provided a method of arbitration by which factual disputes arising between the contracting parties were to be resolved. E. I. DuPont De Nemours & Co. v. Lyles & Lang Constr. Co., 219 F.2d 328, 334 (4 Cir. 1955),

cert. denied 349 U.S. 956, 75 S. Ct. 882, 99 L. Ed. 1280. In none of the cases relied upon by the appellant, E. I. DuPont De Nemours & Co. v. Lyles & Lang Constr. Co., *supra*; United States v. Duggan, 210 F.2d 926 (8 Cir. 1954); Jacobs v. United States, 239 F.2d 459 (4 Cir. 1956), cert. denied 353 U.S. 904, 77 S.Ct. 666, 1 L.Ed. 2d 666 (1957); and 42nd St. Fotoshop, Inc. v. United States, 137 F. Supp. 313 (S.D. N.Y. 1955), had either party submitted the dispute there involved to the agency board. We add that disputes concerning the times of infestation and its discoverability seem to us to be especially appropriate for administrative adjudication under Article 22." (297 F.2d 130 at 133).

In the Silverman case, after the trial court had granted summary judgment on the basis of an administrative determination, the Appellate Court stated:

"The defendant contends that the court was not bound by the Wunderlich Act because the two issues upon which it wished to present evidence --government justification in terminating the contract and the excess costs--are outside the scope of the disputes clause, as they arose out of and after the termination of the contract. Cases are cited by the defendant which hold, in effect, that

the disputes clause is limited to disputes arising under a contract prior to its termination or breach. See, e. g. Jacobs v. United States, 239 F.2d 459 (4 Cir. 1956), cert. denied, 353 U.S. 904, 77 S.Ct. 666, 1 L.Ed. 666 (1957); E. I. DuPont De Nemours & Co. v. Lyles & Lang Const. Co., 219 F.2d 328 (4 Cir.), cert. denied, 349 U.S. 956, 75 S.Ct. 882, 99 L.Ed. 1280 (1955); United States v. Duggan, 210 F.2d 926 (8 Cir. 1954); United States v. Heaton, 195 F. Supp. 742 (D. Neb. 1961).

"While most of the cases cited by defendant are distinguishable in some facet or other from the present case, we prefer to follow the holdings in the Second Circuit that the disputes clause includes any dispute concerning a question of fact arising under the contract whether it arises during performance of the contract or after its completion. Moran Towing & Transportation Co. v. United States, 192 F. Supp. 855 (S.D.N.Y. 1960), appeal dismissed, 290 F.2d 660 (2 Cir. 1961). See also Allied Paint & Color Works, Inc. v. United States, 309 F.2d 133 (2 Cir. 1962), cert. denied, 375 U.S. 813, 84 S.Ct. 41, 11 L.Ed. 2d 48 (1963); United States v. Hamden Co-operative Creamery Co., 297 F.2d 130 (2 Cir. 1961)." (324 F.2d 287 at 289).

The contracts in the case now before the Court contain specific provisions for redress in favor of the CCC in case of any defaults or deficiencies by the contractor in the performance of his duties under the contracts. By these provisions the parties converted what would otherwise have been claims for damages for breach of contract into claims payable under the specific provisions of the contracts. Any defaults and/or deficiencies of the contractor would therefore be considered to have arisen "under the contracts". This is a practice, followed by many Government contracting agencies, as was noted and accepted in United States v. Utah Construction and Mining Co., 384 U.S. 394. The Court, in that case, stated,

"This trend has continued to the point where the field of claims for breach of contract that are not regarded as arising under the contract is becoming very narrow indeed." (Id. at 418).

In the Utah Construction case, the court held the coverage of the disputes clause as a matter susceptible of contractual determination based on the intention of the parties (Id. at 407).

The effect of Appellants' contention in the instant case would be to require the CCC to choose between the provisions of the contracts giving it the right to terminate on one hand, and the provisions establishing the right to recover damages in an agreed manner for failure to perform on the other hand. The contracts in question clearly reflect that this election was not the parties' intention. The express language of the contracts is clearly to the

contrary. Article 23 of the contracts sets forth that, in the event of the contractor's failure or refusal to perform within the time specified in the contracts, the CCC "may, by written notice, terminate the right of contractor to proceed. . . . In addition to any damages which may be provided for in the contract for refusal or failure to perform within the time specified [CCC] shall be entitled to recover the difference between the contract price . . . " and substitute performance by another (Ad. Rec. No. 1).

The argument that the CCC must sacrifice its right to terminate under the terms of the contract in order to rely upon the provisions of the contract with respect to damages is not only contrary to common sense, but would lead to an unreasonable result. The contracts in this case were terminated for two basic reasons: (1) Appellants' demonstrated inability to perform in accordance with the terms of the contracts, and (2) Appellants' failure and refusal to provide adequate performance security required by the contracts (Ad. Rec. No. 1; Exhibit 15 - Telegram to Fishel of April 14, 1963). When the contracts were terminated, any further attempts by Fishel to perform would only have led to additional damages to CCC (Tr. 450-466, 511-515; Ad. Rec. No. 5 - Exhibits 14a through 14m). It would be unreasonable in the extreme to say that the Government must stand idly by while a contractor, who has demonstrated his inability to perform, continues to increase the damages the Government has already suffered, in order for the Government to be able to assert its right to recover damages for

failure of the contractor to perform. This is especially true where, as in this case, one of the reasons for terminating the contractor's right to perform was the contractor's failure to provide performance security. The purpose of performance security was, of course, to insure that the CCC would be reimbursed for its damages.

Recent decisions of the United States Supreme Court, which review cases involving administrative determinations under the standard government contract disputes clause, reveal Appellants' argument regarding the effect of terminating a contractor's right to perform is untenable.

In United States v. Joseph A. Holpuch Co., 328 U.S. 234 (1946), the Court held the failure of a party (to a Government contract containing the standard disputes clause) to exhaust its administrative appeal, bars it from bringing suit in the Court of Claims to recover damages.

In United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963), it was held that, except for questions of fraud, a reviewing court is limited to the administrative record in determining the finality to be given the administrative decision which was based on the standard disputes clause in a Government contract.

In United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966), it was held that, if upon judicial review, the administrative record was found to be inadequate on any issue, the matter should be remanded to the administrative agency for further

proceedings rather than the reviewing court make an original record on such issue. This holding rested on an application of the administrative procedures contractually bargained for, and the rights of parties to contract and provide for their own remedies in case of a breach of the contract.

In United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), the Court held that breach of contract claims are excluded from the coverage of the standard disputes clause. It was held, nevertheless, that factual issues properly determined administratively may not be retried de novo in the subsequent contract action for relief which was unavailable under the disputes clause of the contract. The Court stated:

"Likewise, when the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried de novo in the Court of Claims when the contractor sues for relief which the board was not empowered to give." (Id. at 420).

This decision was based upon the contractual agreement of the parties, and the Court noted the result is harmonious with general principles of collateral estoppel. Numerous cases were cited by the court to illustrate the fact that courts have not hesitated to apply res judicata to enforce the decision of administrative agencies acting in a judicial capacity in resolving disputed issues of fact

(Id. at 421-422).

The foregoing principles were summarized in Crown Coat Front Co. v. United States, 386 U.S. 503 (1967), where the Court stated:

"It is now crystal clear that the contractor must seek the relief provided for under the contract or be barred from any relief in the courts. . . .

"Even when the contractual scheme has run its course and the contractor is free to file his suit in court, he is not entitled to demand a de novo determination of his claim for an equitable adjustment. The evidence in support of his case must have been presented administratively and the record there made will be the record before the reviewing court. United States v. Carlo Bianchi & Co., 373 U.S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652; United States v. Utah Construction & Min. Co., 384 U.S. 394, 86 S. Ct. 1545. The court performs principally a reviewing function. Only if it is alleged and proved that the administrative determination was arbitrary, capricious, or not supported by substantial evidence may the court refuse to honor it. This much is clear not only from the disputes clause itself but from the Wunderlich Act. In that statute, entitled 'An Act to Permit Review', 68 Stat. 81, Congress

widened the scope of judicial review but at the same time recognized the finality of the administrative decision absent the specified grounds for setting it aside. The focus of the court action is the validity of the administrative decision. . . ."

(Id. at 512-513).

III

NO ERROR OF LAW IS REVEALED IN THE RECORD OF THE ADMINISTRATIVE PRO- CEEDING.

Appellee is in accord with Appellants' assertion that finality does not attach to decisions of law made by the Board. However, this is nothing more than a recitation of the second section of the Wunderlich Act, 41 U.S.C. 322. The simple answer to Appellants' argument is that, in granting CCC's Motion for Summary Judgment, the District Court determined all issues of law in favor of the CCC, and as a matter of law, upheld the administrative determination with respect to all issues of fact.

It should be noted that the so-called "issues of law" discussed in Appellants' Brief were never raised by Appellants in the District Court. Accordingly, Appellants may not raise these issues for the first time now, on appeal, inasmuch as an appeal is limited to the theory of the case contended for by Appellants in the trial court. Helvering v. Wood, 309 U.S. 344, 348-349 (1940), Accord: McCullough v. Kammerer Corp., 323 U.S. 327, 328-

329 (1945).

Although an appellate court may affirm a judgment upon grounds not urged in the lower court, it may not reverse a trial court upon such grounds. Palmer v. Reconstruction Finance Corporation, 164 F.2d 466, 468 (2nd Cir. 1947), cert. denied, New York, New Haven & Hartford R. R. Co. v. Reconstruction Finance Corp., 334 U. S. 811 (1948).

Contrary to Appellants' assertion, judicial review is limited to the administrative record and a trial de novo is not permitted. This Court has no more latitude with respect to this review than did the District Court. Appellants failed to convince the District Court that any error of law had been committed. Appellants have again implied to this Court that legal error was committed, but they have totally failed to support this contention, either by reference to the administrative record, or by citations to legal authority. This Court should therefore dismiss such contentions as being totally without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of the United States District Court, for the Eastern District of California, be sustained.

Respectfully submitted,

JOHN P. HYLAND,
United States Attorney,

JAMES STOTTER II,
Special Assistant to the
United States Attorney,

Attorneys for Appellee,
Commodity Credit Corporation

